IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 31/05

THE EDITOR TIMES SUNDAY **1ST APPELLANT**

CHARLES MATSEBULA **2nd APPELLANT**

AFRICAN ECHO (PTY) LTD LIMITED **3rd APPELLANT**

ARNOT PUBLISHING COMPANY (PTY) LTD **4th APPELLANT**

and

SUSAN MYZO MAGAGULA **RESPONDENT**

CORAM: R.N. LEON J.P.

P.H. TEBBUTT J.A. N.W.

ZIETSMAN J.A.

JUDGMENT

ZIETSMAN J.A.

The second appellant is a reporter for the Times Sunday newspaper. On Friday the 13th May 2005 he contacted the respondent telephonically. He told her that he was writing an article concerning her and he wanted

her comments on the article. The respondent asked him to fax a copy of the article to her which he did. The article which she received was of a highly defamatory and insulting nature. The article stated that a certain lawyer, Peter Dunseith, had told the reporter that the respondent was "the most irrational thickheaded person he had ever dealt with" and that she had frustrated the Latif-Tibiyo partnership deal. The article went on to state that according to Dunseith the respondent "is completely un-business like, and she wouldn't even recognise a computer that she sold. It was just as well that she was removed from being Manager Investment."

The respondent was at the time the chief executive officer of The Swazi Observer newspaper and a former Investment Manager of Tibiyo Taka Ngwane.

It is conceded by the appellants that the article in the form in which it was faxed to the respondent was defamatory and insulting of the respondent. It was annexed to the respondent's application as annexure SMI and for the sake of convenience, I shall refer to it as SMI.

The respondent contacted her attorney who in turn spoke to the second appellant in an attempt to prevent the publication of the article. What took place between them will be dealt with hereunder. What eventually happened was that the respondent, on Saturday evening the 14th May, applied for an interdict which was granted in the form of a ***rule nisi*** interdicting the appellants from publishing the article SMI "or any other article defamatory or potentially defamatory of the applicant (the present respondent) in The Times Sunday or any of their News Papers." This had the effect of preventing the publication of an article defamatory of the respondent in the newspaper which was published the following day, on Sunday the 15th May. Further affidavits were thereafter filed. On the return day of the ***rule*** the judge ***a quo*** came to the conclusion that the interim order in referring to "any other article defamatory or potentially defamatory of the applicant" set out too widely the relief granted to the respondent and the following final order was then made:

(a) The Respondents (the present appellants) be and are hereby interdicted and restrained from publishing the article annexed "SMI" to the applicant's founding affidavit; and

(b) The Respondents to pay costs of this application jointly and severally. The one paying the other to be absolved.

The appellants, apart from the reporter referred to above, are the editor, the printer, and the owner and publisher of The Times Sunday newspaper.

The main point argued on behalf of the appellants is that the court ***a quo*** erred in finding that the respondent had established that the appellants intended publishing the article SMI. The submission on behalf of the appellants was that on this question there was a material dispute of fact which could not be finally determined without the hearing of oral evidence. The respondent did not apply for the matter to be referred for the hearing of such evidence and an order confirming the ***rule nisi*** on the return date thereof should therefore not, it was submitted, have been granted.

A further point taken on appeal was that the court ***a quo*** erred in failing to strike out certain paragraphs contained in the respondent's replying affidavit. These refer to two sets of allegations made by the respondent in her replying affidavit.

The first set of allegations concerns a report written by the same reporter which appeared in the Times Sunday on the 8th May 2005. A copy of the report is attached to the respondent's replying affidavit and is marked SM2. This article is defamatory of the prime minister of Swaziland. In that matter also the reporter had sought the comments of the prime minister before publishing the article. The prime minister refused to comment on the draft sent to him. The defamatory article was then published together with a report that despite the attempts of the reporter to obtain the prime minister's comments on the article the prime minister had refused "to even see, listen or respond to the matter". The said article also refers to Susan Magagula, the present

respondent, in the following terms. "He (the prime minister) has been sitting in his own ivory tower hearing people of the caliber of Susan Magagula without ever finding what the true facts are." The respondent states in her replying affidavit that the manner in which the report on the prime minister had been published was a further indication that nothing but a court interdict would have stopped the appellants from publishing article SMI defaming her. The judge ***a quo*** accepted this allegation by the respondent and in his judgment given on the return day of the ***rule*** he states: "Further, annexure SM2 being an article published by the Respondents on the 8th May 2000 (this should read 2005) gave credence to applicant that a similar fate would befall her."

Mr. Flynn, on behalf of the appellants, has submitted that the said article is irrelevant, or, if it is not irrelevant, that it should have been attached to the respondent's founding affidavit and could not be introduced as new matter in the replying affidavit.

The second set of allegations which Mr. Flynn submits should have been struck out concerns an article which was published in the Times Sunday on the 15th May 2005, the day after the granting of the interim interdict.

The article is headed "Judge Blocks Our Story." In this article it is stated that the respondent won an interdict against the newspaper "from publishing a story in her role in the Tibiyo-Ahmed Latif failed deal." The respondent relies upon this article to show that it was in fact the intention of the appellants to publish the article SMI on the 15th May and that the article would have been published if the interdict had not been granted. Mr. Flynn submits that the allegations concerning this article should also have been struck out.

I shall deal with the applications to strike out later in this judgment.

I come now to deal with the discussions which took place between the respondent and her attorney on the one hand, and the second appellant on the other hand, prior to the granting of the provisional order.

According to the respondent and her attorney the latter contacted the second appellant in an attempt to resolve the matter and to avoid litigation in respect thereof. The second appellant would not give an undertaking that the article would not be published but stated that he would consult with his superior, a Mr. Loffler. At approximately 9 p.m. on the 13th May when the respondent's attorney asked the second appellant whether he had consulted with his superiors the second appellant told him that he was going ahead with the publication of the article. On the following morning, Saturday the 14th May, the second appellant again told the respondent's attorney that he was going ahead with the publication of the article.

The respondent's application was served on the appellants on Saturday evening and they had insufficient time to file opposing affidavits before the hearing of the matter at 7 p.m. that evening. However, the second appellant appeared in person to oppose the granting of the interim order.

According to the judgment of the judge ***a quo,*** in which he sets out his reasons for granting the interim order, the second respondent told him that it was not the intention of the appellants to publish the article SMI portions of which still had to be edited. He admitted that some portions of the article were defamatory of the present respondent and said that they would be excised from the rest of the article. He, however, did not indicate what portions would be excised and he did not indicate exactly what would be published. The judge ***a quo*** then granted the ***rule nisi*** interdicting the appellants from publishing SMI or any other article defamatory or potentially defamatory of the appellant, pending the return date of the ***rule.***

It was not disputed before us that an applicant is entitled to claim an interdict to prevent the publishing of an article defaming him. He is not obliged to wait for the article to be published and to then pursue a claim for damages. See in this connection the cases of **Cleghorn & Harris, Ltd. v. National Union of Distributive Workers 1940 C.P.D. 409: Minister of Justice v. S.A. Associated Newspapers Ltd. 1979 (3) S.A. 466 (C) at 474 C - D; Hix Networking Technologies v. System Publishers fPty) Ltd and Another 1997 (1) S.A. 391 (A) at 399 C - D.** It is also not disputed that the article

SMI is defamatory of the respondent and that the respondent would have been entitled to an interdict preventing its publication.

In order to obtain an interim interdict in this case the respondent had to establish a ***prima facie*** right and that she would suffer irreparable harm if the interdict was not granted. What she also had to show was a reasonable apprehension that the defamatory article would be published in the appellant's newspaper the next day if an interdict was not granted. See **Setlogelo v. Setlogelo 1914 A.D. 221; Church of Scientology v. Readers Digest Association 1980(4) S.A. 313 (C) at 318 D-F.**

What the judge ***a quo*** had before him was the applicant's founding affidavits and the verbal statement by the second appellant that the article which the appellants intended to publish was in fact defamatory of the respondent but would be edited before publication. He stated that the defamatory sections of the article would be excised therefrom but he did not say what changes would be made to the article. This being the case the judge ***a quo*** was, in my opinion, justified in finding that the respondent had established a reasonable apprehension that the defamatory statements contained in SMI would be published if an interdict was not granted. He granted the ***rule nisi*** on the basis that the balance of convenience justified the granting thereof. In my opinion the granting of the ***rule nisi*** was fully justified.

After the order had been granted, opposing affidavits by the appellants and replying affidavits by the respondent were filed.

The main affidavit filed on behalf of the appellants is an affidavit given by the reporter, the second appellant. The gist of his affidavit is a denial that it was the intention of the appellants to publish SMI.

The second appellant states in his affidavit that SMI was not intended to be an article for publication and that it is wrong to refer to it as "the article". He describes it as a "summary" or "gist" and states that he did not intend to use insulting comments about the respondent in any article which he would eventually write. He states that he intended to interview her and to obtain her response to the "summary". He states that when the respondent's attorney asked him whether he was going

to go ahead with the publication of his article he told him the was not going ahead with it, he was waiting for the respondent's response thereto. Later on in his affidavit he states that he discussed the matter with his editor and it was decided that the story with regard to the role the respondent played in the Tibiyo matter would be published as it was a matter of public interest. He states that he explained to the respondent's attorney that no defamatory statement would be published. He states further that he suggested to the respondent's attorney that he and the respondent should look at SMI and circle the statements which they felt were not in good taste and needed to be corrected, and he alleges that it was unreasonable for the respondent to refuse to respond to the allegations contained in SMI. He states: "*I did not wish to publish without her response as I believed it would be unfair to report Latif's allegations without an effort to elicit the applicant's side of the story*".

At one stage in his affidavit the second appellant alleges that he asked the respondent's attorney what the respondent's reaction would be if he changed the first paragraph of the story to read that the respondent was "a most difficult person". The first paragraph of SMI reads as follows:

"*Swazi Observer Chief Executive Officer, Susan Myzo Magagula is the most irrational thickheaded person lawyer Peter Dunseith has ever dealt with. The lawyer told the Times Sunday that in his whole life both professionally and socially Magagula was the worst person of them all*".

The whole article deals with statements allegedly made by Dunseith to the Times Sunday reporter. To change the description of the respondent would be to attribute to Dunseith words which he never used. In his replying affidavit the respondent's attorney denies that he was asked what the respondent's reaction would be if the article was altered to describe the respondent simply as a most difficult person.

The second appellant's allegation that SMI is a summary and not an article prepared for publication is denied by the respondent and cannot be accepted. If it was a mere summary with the intention of obtaining

the respondent's response thereto the respondent would simply have been told what Dunseith had said and asked to comment thereon. Instead of that what was sent to her was a lengthy article with the main defamatory allegations contained in the body thereof and highlighted and repeated in the first paragraph. The article is headed "BY CHARLES MATSEBULA. MBABANE" and is clearly in the form of an article prepared for publication.

In his affidavit the second appellant states that the respondent's attorney wanted to know whether the article was to be published and his answer was to ask the attorney why his client was not calling him "because what would determine the publication is a response, that is , what she was going to say".

The second appellant states further that he told the respondent's attorney that he intended to take legal advice before finalising the article for publication. It appears however that by 7 p.m. on Saturday the 14th May no attempt had yet been made to take such advice or to edit or rewrite the article which was to be published in the newspaper the following day.

I came now to deal with the applications to strike out the allegations concerning the publication on the 8th May of defamatory matter concerning the prime minister, and the publication of the article headed "Judge Blocks Our Story" on the 15th May 2005.

In his opposing affidavit the second appellant alleges that he had no intention of publishing an article in the form of SMI and that an article, devoid of any insults or defamatory comments would, after it had been edited and checked by the newspapers's legal advisers, have been published. In order to refute the allegation that there was no intention on the part of the appellants to publish material defamatory of the respondent the respondent sought to show in her replying affidavit that the appellants had already printed an article highly critical of her and defamatory of the prime minister a week earlier, on the 8th May. What is also notable is the fact that in the prime minister's case a draft of the defamatory article had also been sent to him with a request for

his comments. When he failed to comment thereon the defamatory article was published.

Mr. Flynn has submitted, as stated above, that the article of the 8th May is irrelevant, or if it is not irrelevant it should be struck out because reference thereto should have been made in the respondent's founding affidavit. It is, he submits, something new which could not be introduced in a replying affidavit.

The question is whether the allegations are a legitimate reply to what is contained in the appellants' opposing affidavits. In his affidavit the second appellant alleges that no insulting or defamatory statements concerning the respondent would have been printed in the newspaper. He says that SMI would have been edited before publication but he does not say what parts would have been excised from the article. The fact that the respondent could show that in a matter also involving the respondent where a similar procedure had been followed by the appellants the defamatory article was published when the person concerned (the prime minister) refused to comment thereon is, in my opinion, a response to the appellants' allegations and is relevant to the question whether the respondent had a reasonable apprehension that SMI, on which she was also not prepared to comment, would be published if an interdict was not granted. My conclusion is that the judge ***a quo*** correctly ruled that the allegation should not be struck out.

The other set of allegations sought to be struck out by the appellants refer to the publication of the article "Judge Blocks Our Story" printed in the newspaper on the 15th May 2005, the day after the interim interdict was granted. In that article it is stated that the respondent had successfully obtained an interdict against the newspaper "from publishing a story in her role in the Tibiyo-Ahmed-Latif failed deal". It goes on to state "Magagula responded by sending a copy of the draft of the article to her lawyers and instructed them to stop its publication".

These allegations are in my opinion also relevant. They show that the appellants intended to publish an article about the respondent on the 15th May. The only article prepared for publication at the time when the

interdict was granted was SMI. The report also states that what was sent to the respondent was "the draft of the article" and this gives the lie to the second appellant's allegation that SMI which was sent to the respondent was not the draft of an article prepared for publication.

In my opinion these allegations also are a direct response to the allegations made by the appellants in their opposing affidavits.

The judge ***a quo,*** in the exercise of his discretion, allowed both sets of allegations to stand as part of the papers before the court and in my opinion it cannot be said that he exercised his discretion incorrectly. That there is a measure of flexibility and discretion in such matters is clear from decisions such as **James Brown & Hamer (Pty) Ltd. v. Simmons, N.O. 1963 (4) S.A. 656 (A) at 660 E.F; Wiese v. Joubert en Andere 1983 (4) S.A. 182 fO) at 194 F-H.**

I come now to deal more specifically with the question whether the judge ***a quo*** was correct in granting a final interdict on the return day of the ***rule nisi.***

An applicant is required to prove three well-known requisites in order to obtain a final interdict. They are (a) a clear right, (b) injury actually committed or reasonably apprehended, and (c) the absence of any other satisfactory remedy available to him. See **Setlogelo v. Setlogelo (supra); Fanapi v. East Cape Administration Board 1983 (2) S.A. 688 (E) at page 694 A-B.**

Mr. Flynn's submission in the present case is that there is a dispute of fact on the question whether the appellants intended to publish SMI. This dispute, he submits, cannot be resolved on the papers. The respondent did not apply for the hearing of oral evidence and on the papers she failed to discharge the ***onus*** of proving that SMI would be published and that she would suffer irreparable harm if the interdict was not granted.

What the respondent had to prove was a reasonable apprehension of injury, in this case a reasonable apprehension that the article SMI would be published if the interdict was not granted. She had clearly proved the other two requisites for an interdict namely a clear right not

to be unlawfully defamed and the absence of any other satisfactory remedy. Did she prove a reasonable apprehension that article SMI would be published if the interdict was not finalised?

The test to be applied is an objective test, namely whether a reasonable person would in the circumstances have entertained such an apprehension. See **Pickles v. Pickles 1947 (31 S.A. 175 (W) at 179 -180; Nestor and Others v. Minister of Police and Others 1984 (4) S.A. 223 fSWAI at 244 F - I; Janit and Another v. Motor Industry Fund Administrators (Pty) Ltd.** and Another **1995 (4)** S.A. 293 **(A) at 304 G - J.**

What is important in this case is that during the negotiations between the respondent's attorney and the second appellant, the second appellant failed to give a clear undertaking that SMI would not be published. He merely alleged that publication would not take place before SMI had been edited and legal advice taken. When the interim interdict was sought, and even thereafter, the second appellant failed to produce an edited version of SMI free of the defamation. He wanted the respondent, and also the court, to trust him when he said that the defamatory material would be excised from the article. He did not say exactly what would be excised.

A perusal of the papers shows, in my opinion, that what was faxed to the respondent was an article prepared for publication. What the second appellant sought from the respondent was not a discussion with her with a view to a mutual editing of the article by the two of them, but simply her response to the article. She was not prepared to respond thereto. She wanted the publication of the article stopped.

In my opinion the judge ***a quo*** was justified in coming to the conclusion on the papers before him that, despite the vague assurances given by the second appellant, the respondent had succeeded in establishing a reasonable apprehension that if the interdict was not granted the article SMI would have been published.

My conclusion therefore is that the respondent succeeded in establishing all of the requirements for a final interdict and that the judge ***a quo*** was justified in confirming the ***rule nisi*** concerning the publication of SMI.

On the question of costs, Mr. Flynn pointed out that the interim order interdicted the appellants from publishing the article SMI "or any other article defamatory or potentially defamatory of the applicant''. On the return date the judge ***a quo*** found that the interim relief sought and granted to the respondent was too widely stated, and the words "or any other article defamatory or potentially defamatory of the applicant" were deleted from the interim order. The final order interdicted only the publishing of SMI. To that extent, therefore, the appellants succeeded in their opposition to the confirmation of the ***rule.*** Mr. Flynn submits in the circumstances that the appellants should have been awarded costs in the court ***a quo.*** The appellants also opposed the order interdicting the publication of SMI on the ground that there was no intention on the part of the appellants to publish SMI. It is our finding that the respondent established a reasonable apprehension that SMI would be published, and that the court ***a quo*** was justified in granting the order interdicting the publication of SMI. To that extent the respondent succeeded. In my opinion a fair order would be that no order be made in respect of the costs incurred in the court ***a quo.***

As regards the costs of appeal, the cost order made by the court ***a quo*** is to be deleted, and to that extent it may be said that the appellants have had some limited success on appeal. However, such limited success, in my opinion, does not justify a departure from the normal rule that costs should follow the result. On the merits the respondent succeeds and the appellants will accordingly be ordered to pay the costs of the appeal.

I would order that the appeal is dismissed with costs save that paragraph (b) of the order made in the court ***a quo*** is deleted from the order and is substituted by the following:

(c) No order as to costs.

N.W. ZIETSMAN

JUDGE OF APPEAL

I
agree

R.N. LEON

JUDGE PRESIDENT

P.H. TEBBUTT

JUDGE OF APPEAL